Submission to the Senate Legal and Constitutional Affairs Committee on the Whistleblower Protection Authority Bill 2025

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Fusion

Planet Rescue | Whistleblower Protection | Innovation

Foreword

Fusion thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission about how whistleblowers should be better protected in Australia.

FUSION | Planet Rescue | Whistleblower Protection | Innovation represents over 1,700 members who believe in technological advancement, climate action and civil liberties.

This submission has mainly been written by Owen Miller. Mr Miller graduated in 2012 from the University of Sydney, studying BSc (Computer Science) and BEng (Mechatronics) (Hons I). His career as a software engineer has included roles at Amazon, at the Defence Science & Research Organisation (DSTO) and at startups in Sydney and New York.

Introduction

Australia's score is improving, but we are still short of our highs when it comes to the Corruption Perceptions Index. Considering Australians' purported love of a fair go and our reliance on free-market economics, this ongoing corruption is eroding our national identity and seeing swathes of our society join in the game of *exploiting each other* and *exploiting our common wealth*.

The whole Robodebt program from 2016 was motivated by people cheating the welfare system, and yet rampant welfare fraud and tax fraud continues 9 years later. The NDIS budget continues blowing out to staggering amounts, and whether or not there's any fraud there, the ***widespread public perception*** is that there is.

Successive governments have earned Australia a reputation for corruption, which was *almost* resolved by the promise of a National Anti-Corruption Commission, but then the public saw how this commission actually panned out.

Sorting out this widespread distrust of the government is an urgent matter of national security − just as the Arab Spring spread from one dictatorship to the next, the ***imminent*** breakdown of civil order in the US will very readily spread to civil unrest here, if the popular narrative is one of institutions no longer being trustworthy.

To address this proposed whistleblowing bill, what now follows are some summary recommendations, followed by a deeper justification for them.

Recommendations for the Whistleblower Protection Authority

1. Grants should be issued for the documenting of whistleblowing case studies, to guide a well-informed approach to creating this new authority.

2. The Whistleblower Protection Authority should be merged with the Ombudsman and the National Anti-Corruption Commission
3. The authority should report directly to parliament, not to a minister.
4. The authority's staff should have their compensation set by the Remuneration Tribunal.
5. Acting in good faith should not grant immunity to staff of the new authority.

Broader Recommendations

6. All government-funded software should be open-source.
7. Australia should implement a Universal Basic Income, perhaps in the way advocated by Basic Income Australia, on the understanding that it will eliminate welfare traps and reduce the potential for welfare fraud.
8. Australia should stop bailing out companies without actually getting any equity. Such a practice is inherently prone to corruption.
9. To ensure unbiased truth, Australia should fund a broader (potentially foreign) group of media organisations, not just the ABC and SBS. They have not been shining a sufficiently bright light on the government, sometimes because they're scared of consequences: see the Antoinette Lattouf saga.
10. Australia should steer away from censorship bodies, especially the "Ministry of Truth", and should instead fund viable open-source competitors to existing public squares. If people cannot receive trustworthy information, they cannot verify what the government is telling them.

Explanations

1. Whistleblowing Case Studies

There is not much literature about how whistleblowing cases have been handled, and it would be a shame if the committee had to blindly create this new authority.

There are academics such as A J Brown with backgrounds in public integrity who could contribute to the investigation and documentation of case studies of how whistleblowing cases have been handled in the real world.

Issuing a few grants to academics could make a massive impact to this new authority.

In the immediate term though, we would like to provide two cases studies here, with further detail in the appendices.

ANU School of Music

Professor Peter Tregear (head of the School of Music at ANU) publicly disclosed to the Ombudsman that 11 senior ANU employees were guilty of corruption and maladministration. ANU then hired an external investigator, who publicly gave character assessments of Professor Tregear as "untrainable" and that "he is a liar [and] a manipulator". Professor Tregear felt this had no place in a public interest disclosure report, and raised it with the Ombudsman. Cassandra Hodzic (with the Ombudsman) started investigating and requested various information from ANU, but they kept ignoring her, so she closed the investigation. The Ombudsman had the power to compel ANU to give them the information, but Cassandra Hodzic just didn't invoke this power.

Registrars at the Federal Court

There was an allegation of unlawful recruitment / promotion of registrars in the Federal Court. Kate McMullan carried out an investigation, then acting Ombudsman Penelope McKay investigated the inadequacy of Kate McMullan's investigation. Mark Anstey (acting assistant director in the Public Interest Disclosure Team) killed Penny McKay's investigation on the grounds (disputed by observers as being invalid) that the Public Interest Disclosure Act does not provide a mechanism for a finalised Public Interest Disclosure investigation to be re-opened, so the Ombudsman cannot take any action that would cause an agency to re-open an investigation.

2. Merging Government Bodies

The scope of the Ombudsman has grown over the years to be essentially a complaints department for the government. So if someone knows something went wrong, they should call the Ombudsman. But if they also know a bit of backstory about why something went wrong, then they're essentially a whistleblower, so do they contact the Ombudsman or the Whistleblower Protection Authority?

If they know that some corruption went on, then they could similarly report the issue to the NACC. Is it intentional that whistleblowers are meant to be able to shop around?

There's also the issue that each department could readily pass the buck elsewhere.

Finally, let's consider it from a different whistleblower's perspective: if you get the type of everyday Aussie battler you see on A Current Affair, complaining that something's *not right* within some particular government body, then can they really be expected to know the nuances of where they're supposed to report this issue?

What's really needed is an Office of Integrity.

Just like the NACC, it could be proactive, but Fusion feels it could be extended further to support research and development for tools and practices that allow transparency and scrutiny throughout Australia and the rest of the world.

Tools for open-source intelligence would be an obvious possibility here, as well as encryption tools and blockchain tools.

3. Reporting to Parliament

It's easy to imagine a whistleblower reporting an issue that would be politically damaging to the minister responsible for this new authority. Whether or not the minister would actually exert pressure on the whistleblowing authority, the staff may just act this way because they don't want to find out what the consequences would be.

Furthermore, what would be going through the whistleblower's mind when they're thinking of reporting an issue that would be politically damaging to the responsible minister? It doesn't matter how honourable this minister is; the situation is not ideal and the authority needs as much independence as possible: it must report directly to parliament.

4. Remuneration of Staff

Looking at the Public Service Gazette from 9 May 2025, there is a job at the Office of the Commonwealth Ombudsman: an assessment officer. It's mentioned here that the role is ideally suited to recent graduates in law, criminology or international relations. The classification for the role is, in accordance with the Public Service Classification Rules 2000 (Cth), set at APS 4, making the remuneration $76,351.

This might seem fine, if the job-seeker doesn't read in the Australian Financial Review that law graduates in Sydney are "about to crack a salary record" − the nation's eight major law firms will pay all Sydney-based graduates at least $100,000.

Since the positions can't simply be re-classified as APS 5 or EL 1, the solution seems to be to take the approach of the courts and use the Remuneration Tribunal. It's our view that this tribunal should be used instead of the APS remuneration system for a lot more government employees too.

5. Immunity from Litigation

The proposed law grants near-total legal immunity to staff of the new Whistleblower Protection Authority (WPA). Stipulating that whistleblowers can only sue WPA employees if they acted in "bad faith" is a very high legal bar that almost never applies, even in cases of serious mistakes or unlawful decisions.

Even if a WPA investigator misinterprets the law and dismisses a valid whistleblower case, the whistleblower cannot challenge it unless they can also show that this misinterpretation was ***deliberate*** **dishonesty or malice**.

This proposed immunity is very similar to section 78 of the Public Interest Disclosure Act, but notice there that a clause is carved out to protect those rights conferred by the Administrative Decisions (Judicial Review) Act so that a decision can be challenged merely for being incorrect.

Some worry that lawsuits will unfairly target individual employees, but there are some points to note:

- The government (not the employee) pays any compensation.
- The lawsuit is about fixing the decision, not punishing the person.

There was an explanatory memorandum for the whistleblowing bill, but all it did was restate the same clause, it did not actually explain the reasoning:

> **Clause 64: Immunity from civil proceedings for staff members of the Authority and persons assisting**
>
> 109. This clause exempts a staff member of the Authority from liability in civil proceedings in relation to an act done, or omitted to be done, in good faith and in accordance with the Act. This immunity extends to persons assisting a staff member at the request of the Commissioner.

6. Open-Source Software

It has previously been recommended by Fusion that all government-funded software should be open-source. One way of arriving at this conclusion is the fact that you'd make the most of the spending by opening up the end product to a broader group of people to use this software.

Then there's the fact that citizens may not just want to use this software, they might want to participate in its maintenance and improvement, just like the gov0 movement in Taiwan. If passionate, capable software engineers want to improve your government software for free, *why on earth would you stop them?*

What kind of backwards country would stop its best people from helping?

But then there's the 3rd point for how open-source software fits in: it adds transparency to government operations. If people could see the Robodebt algorithm for instance, they could've spotted that it's flawed, and maybe they could've written something smarter.

But even if they didn't, if the public get the sense that the government is overly secretive, then they're prone to losing trust and in turn, to overthrowing the government.

We mentioned in the introduction that civil unrest in the US is likely to spread here − just look how readily we imported the protests originally opposed to police violence against African Americans. Australian protestors deemed Aboriginal Australians to be sufficiently similar victims, and Australian police to be sufficiently similar perpetrators, leading to tens of thousands of protestors marching from Town Hall in Sydney.

Even the "Kony 2012" movement spread from the US to Australia, complete with signs of the Democrat donkey and the Republican elephant. Many Australians wouldn't have known what the signs meant, but they were still prepared to endorse a request for the US to hunt down an African warlord.

If the Australian government is not ready to defend against protests about the country being run by an opaque cabal who doesn't have citizens' best interests at heart, then it really only has itself to blame.

7. Universal Basic Income

In *The Virtues of Being a Dole-Bludger*, it has been argued that by forcing people into jobs, they're inevitably forced into immoral jobs. A stronger safety net from a Universal Basic Income would therefore allow more people to resign on moral grounds − exactly the sort of phenomenon that leads to whistleblowers.

Whistleblowers (or moral objectioners more broadly) need to feel that they're not going to be left destitute if they suffer retaliation.

You could create hundreds of extra laws and appoint an army of civil servants to enforce such protections, or you could just pay all citizens enough money for a basic life, and most of the *retaliation problem* would be resolved.

8. Company Grants

It's puzzling that it's still a common phenomenon for Australian governments to give large grants to companies with no equity in return.

The promise of jobs just isn't good enough, and understandably creates suspicions of corruption.

It doesn't make sense to create a golden opportunity for corruption, then wait for the inevitable to happen, then create a convoluted system for protecting the whistleblowers who will hopefully come forward.

Why not prevent the corruption from ever having a chance? If the government still desires to play an active role in assisting Australian companies, then it can take an approach more like France or China. It might also seek to provide industry-wide, company-neutral approaches

like funding research & development through the CSIRO and universities for the use of all Australian companies.

9. Media Funding

Through incidents such as the Antoinette Lattouf saga, the ABC has shown that it just can't be trusted as much as Australians have hoped.

There have also been incidents where ABC election coverage has not just downplayed the potential of minor parties − they've framed it as if we weren't in the election at all!

When organisations such as Al Jazeera manage to become reputable sources of news and build up a following, why not chip in for their funding and help ensure their continued impartial coverage of Australian events, amongst other stories? Why put all our eggs in one or two baskets?

As the ABC and SBS go through inevitable lulls in quality and objectiveness, if we were funding other news sources too, then we could expect that Australian news could still receive professional treatment.

We could also assist hyper-local news outlets such as Brunswick Voice.

If whistleblowers are going to raise an issue, they need somewhere to actually tell the story, and many whistleblowers prefer going to journalists rather than going to a government department who may participate in a coverup.

10. Avoiding Censorship

Besides leaking wrongdoing to journalists or governments, whistleblowers also like to leak secrets at the public square.

By banning citizens under 16 years old, there's a presumption that such citizens have nothing important to say, and the inevitable uploading of passports will diminish trust amongst other users who suspect that the government has too much involvement in the public square. Especially if they're blowing the whistle on government practices, people are going to be suspicious that the government will get involved in a coverup.

If people are free to chat openly, they can explore ideas with each other. Sure, some of these ideas will be conspiracy theories, but if the theory doesn't end up having any holes in it, then just from public knowledge, citizens could end up inferring a lot about the affairs of secretive organisations. Such is the basis of open-source intelligence.

With open-source intelligence, we don't need whistleblowers revealing secrets from the inside; we can rely on the public to uncover what's going on.

But if making a mistake in your investigative collaboration means being banned forever after, then the public square gets shut down from any open-source intelligence; any political discourse; and any conversations of any intellectual value.

By censoring the public square, you end up turning it into a place for vapid conversations, interpersonal drama, and inevitably, bullying.

It still remains Fusion's view that rather than trying to censor public squares, the Australian government should make it easier to uncover the truth.

Conclusion

Fusion does not recommend passing the bill in its current form.

We have provided some specific advice about how to improve the proposed Whistleblower Protection Authority, although the best protection for whistleblowers is to make them unnecessary. By moving towards a more transparent government, we will ensure greater prosperity and greater trust in institutions. This is needed with extreme urgency, if Australia is to weather the unfolding catastrophes in fellow democracies.

Appendix

The following pages provide further detail into the two incidents mentioned previously:

- ANU School of Music
- Registrars at Federal Court

COMMONWEALTH OMBUDSMAN

Our ref: 2019-402149

21 September 2020

Professor Peter Tregear
By email to: peter.tregear@gmail.com

Dear Professor Tregear

I am writing to let you know that I have finished investigating your complaint about the Australian National University's (ANU) handling of your public interest disclosure (remade PID 2018-300002).

Broadly, your complaint concerned the adequacy of the ANU's investigation of your disclosure. You raised a number of issues, including:

- the investigator's findings were unreasonable on the basis of the information you provided for the purposes of the investigation
- it was unclear from the investigation report how the investigator assessed your documentary evidence and oral evidence at interview
- the investigation report did not address some of the particulars of your allegations
- the investigator appeared to raise doubts about your credibility in the investigation report.

Our role

Our Office's role in assessing a complaint about an agency's handling of a disclosure is to consider whether the agency's actions and decisions were consistent with its obligations under the *Public Interest Disclosure Act 2013* (PID Act) and reasonably open to it. We do not re-investigate the allegations made in the disclosure.

Under the *Ombudsman Act 1976* (Ombudsman Act), we may decide not to continue investigating a complaint where we form the view that further investigation is not warranted in all of the circumstances. A relevant consideration for our Office is whether further investigation of the complaint would be likely to result in a different outcome.

Where we identify flaws in an agency's handling of a disclosure, we may make comments or suggestions to the agency under section 12(4) of the Ombudsman Act. However, we do not have the power to compel an agency to take a particular course of action.

Our investigation of your complaint

The ANU engaged an external investigator to investigate your disclosure and to prepare a report for the ANU's consideration. The investigation report records that the investigator reviewed the material you provided in support of your disclosure, conducted a 'desktop review' of numerous documents and emails provided by the ANU, and conducted interviews with 11 witnesses. The investigation report was accepted and adopted by the ANU. At our request, the ANU provided our Office with an unredacted copy of the report and records of witness interviews.

We subsequently requested additional information from the ANU to enable us to better understand what evidence the investigator considered in reaching particular conclusions, and if the investigator did not consider or give weight to certain material or allegations, why. We followed up on our

request on a number of occasions between April and August 2020. The ANU ultimately did not provide a response.

In the circumstances, we decided to progress our investigation of your complaint based on the information available to us. In doing so, we made some observations to the ANU about its investigation of your disclosure. We invited the ANU to provide a response to our comments, but it did not do so.

Although the investigation appears to have been reasonably comprehensive, based on the information we reviewed, we formed the view that the investigation report did not adequately explain the basis for some of the investigator's findings. As the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open.

We also referred the ANU to the procedural fairness requirements discussed in our Office's Agency Guide to the PID Act. We explained that you had raised concerns about the comments '*he is a liar, a manipulator'* and '*untrainable*' having been included in the investigation report. We observed that it was unclear whether you had been given an opportunity to respond to those comments, to the extent that the investigator intended to rely on them. We suggested that if the investigator had not formed an adverse view of your credibility, or if the comments were not materially relevant to the findings of the investigation, it was unclear why they were included in the report.

The ANU did not respond to our observations.

Conclusion

I have decided to finalise my investigation of your complaint at this point, because I do not think that further investigation would be likely to result in a different outcome for you. Our Office will consider whether it is appropriate to make any further comments or suggestions to the ANU under section 12(4) of the Ombudsman Act with a view to improving future administration of the public interest disclosure scheme. I acknowledge that this may not be the outcome you were seeking, but I do not think that further investigation would be likely to achieve a better result.

The PID Act contemplates that a discloser may make an external disclosure if all of the criteria in section 26 have been met. Our Office cannot comment on whether it is open to you to make an external disclosure in all of the circumstances. We recommend that you seek independent legal advice about the options that may be available to you going forward.

If you think I have overlooked something or there is further information I should consider before finalising my investigation of your complaint, please email me at PID@ombudsman.gov.au. If I do not hear from you by **5 October 2020**, I will proceed to finalise my investigation and close your complaint.

Thank you for bringing your concerns to the attention of the Ombudsman's Office.

Yours sincerely

By email

Cassandra Hodzic
Investigation Officer
Public Interest Disclosure Team

OFFICIAL

Our ref: 2021-104592

Dear Discloser

I refer to your request for a review of my decision. I note the voluminous nature of your request. We will not be actioning the request as it stands. You are welcome to provide us with 3 pages explaining why you believe the decision was wrong. We can then assess the request and decide whether to conduct a review.

Kind regards

Mark
A/g Assistant Director
Public Interest Disclosure Team
COMMONWEALTH OMBUDSMAN
Phone: 1300 362 072
Email: ombudsman@ombudsman.gov.au
Website: www.ombudsman.gov.au

COMMONWEALTH OMBUDSMAN

Influencing systemic improvement in public administration

From: Discloser (External Disclosure)
Sent: Friday, 10 March 2023 7:49 PM
To: Ombudsman <Ombudsman@ombudsman.gov.au>; Iain Anderson <iain.anderson@ombudsman.gov.au>
Cc: PID <PID@ombudsman.gov.au>; Emma Cotterill <Emma.Cotterill@ombudsman.gov.au>; Katrina Dwyer <katrina.dwyer@ombudsman.gov.au>; Mark Anstey <Mark.Anstey@ombudsman.gov.au>
Subject: [External] Request for review of Mark Anstey's decision: Ombudsman ref: 2021-104592

I – APPLICATION FOR REVIEW

Introduction

[1] On 26 October 2021, I lodged a complaint with the Office of the Commonwealth Ombudsman about the inadequacy of public interest disclosure investigated by Kate McMullan of the Australian Public Service Commission.

[2] On 12 December 2022, 412 days after I lodged my complaint, Mark Anstey, an acting assistant director in the Public Interest Disclosure team of the Office of the Commonwealth Ombudsman, rendered his decision.

[3] This is an application for review of Mark Anstey's decision. [1]

Timeliness of application

[4] According to the website of the Office of the Commonwealth Ombudsman, [2] "[a] request should be made in writing within three months of being told of our final decision." This application has made within three months of Mark Anstey's decision of 12 December 2022.

Where application should be sent

[5] According to the Review information sheet and request form, which is downloadable on the website of the Office of the Commonwealth Ombudsman, [3] a request for review should be sent to ombudsman@ombudsman.gov.au. I have also copied the following people into this email:

a) Iain Anderson, the Commonwealth Ombudsman, so that he is aware of the request for review and, more importantly, is aware of Mark Anstey's demonstrated incompetence (I will demonstrate that Mark Anstey has an unacceptable command of the *Public Interest Disclosure Act 2013* (Cth), authorities of the High Court and the Full Court of the Federal Court, basic logic and the facts relevant to my complaint);

b) Emma Cotterill, the Senior Assistant Ombudsman responsible for the Public Interest Disclosure team;

c) Katrina Dwyer, the person who was introduced to the Senate's Legal and Constitutional Affairs Legislation Committee as the Acting Director of the Public Interest Disclosure team during the public hearing on the Public Interest Disclosure Amendment (Review) Bill 2022; and

d) Mark Anstey, the acting Assistant Director in the Public Interest Disclosure team, so that he can reflect on his incompetence and use this as an opportunity to advance himself.

Reference number

[6] Mark Anstey noted that the reference number for his decision was "2021-104592".

Contact details

[7] You already have my contact details and they remain the same.

Grounds of review and complaint

[8] In this email, I set out, in parts IV – XI, 8general grounds of review. The grounds of review range from errors of law, including a jurisdictional error on Mark Anstey's part, errors of fact made by Mark Anstey during his investigation under the *Ombudsman Act 1976* (Cth), and other errors.

[9] In part XII, I set out a ground of complaint about the time it took Mark Anstey to provide his decision.

[10] I also set out, in part XIII, specified grounds of review. The grounds of review, being specific to the circumstances relating to the recruitment of registrars of the Federal Court, are organised by reference to each registrar's recruitment.

II – THREE BROAD GROUNDS MARK ANSTEY RELIED ON TO TERMINATE INVESTIGATION UNDER THE OMBUDSMAN ACT 1976 (CTH)

[11] From the outset, I note that Mr Anstey's process of reasoning is meandering and, at times, difficult to make sense of. I also note that Mr Anstey did not identify the power upon which he relied to terminate his investigation under the *Ombudsman Act 1976* (Cth), although, given the context of his record of decision, I assume that Mr Anstey relied on subsection 12(1) of the *Ombudsman Act 1976* (Cth) to terminate his investigation.

[12] Mr Anstey appears to have justified terminating his investigation on three broad grounds.

[13] First, Mr Anstey stated:

> I appreciate that you are likely to be disappointed by the outcome of your complaint given your view there were numerous deficiencies with the investigation of the PID and the resulting report under s 51 of the Public Interest Disclosure Act 2013 (PID Act). It is important to note that our Office cannot take any action that would cause an agency to reinvestigate a PID. This is because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.

[14] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."

[15] Second, Mr Anstey stated:

> Our Office has broad discretion to decline to further investigate when we consider it is not warranted having regard to all the circumstances. There are various considerations relevant to the exercise of this discretion. One key factor is whether further investigation is likely to result in a practical or otherwise substantive outcome. In this case it is my view there is no practical outcome we could obtain by further investigating the complaint.

[16] Thus, a key factor in Mr Anstey's decision to terminating the investigation under the *Ombudsman Act 1976* (Cth) was his view that no practical outcome could be obtained by further investigation of the complaint.

[17] Third, Mr Anstey states:

> Based on our investigation, which involved seeking copies of internal records from the Investigating Agency and interviewing the PID Investigator, I consider there are several ways in which the PID investigation and associated report could have been improved. That said, as noted below, I found that most of the key findings were not unreasonable for the Investigating Agency to make.

[18] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, most of the key finding that Kate McMullan made were not unreasonable for her to make.

III – A SUMMARY OF THE GROUNDS OF REVIEW

[19] Part IV of this email sets out an analysis of why Mark Anstey's claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is, as a matter of law, nonsense.

[20] Part V of this email sets out an analysis of why Mark Anstey's claim that "no practical outcome" could be obtained by further investigation of the complaint in the inadequacy of Kate McMullan's public interest disclosure investigation is, as a matter of law and as a matter of fact, nonsense.

[21] Part VI of this email sets out, in the light of judgments of the High Court of Australia and the Full Court of the Federal Court of Australia, an analysis of the error of law committed by Mark Anstey when he failed to disclose material information used to make a decision adverse to my rights and interests and, thus, failed to afford me procedural fairness.

[22] Part VII of this email sets out an analysis of Mark Anstey's failure to identify logically probative and relevant evidence that he relied on to make findings of fact and draw conclusions on the way to making his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[23] Part VIII of this email demonstrates Mark Anstey's selective use of materials available to him to support findings that were convenient to him and his preconceived conclusions rather than

addressing and assessing the totality of the materials available to him to make a lawful decision under the *Ombudsman Act 1976* (Cth).

[24] Part IX of this email demonstrates how Mark Anstey went out of his way to ignore specified and well articulated grounds of complaint set out in my correspondence of 26 October 2021, presumably to justify his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[25] Part X of this email sets out an analysis of Mark Anstey's failure to apprehend the relevnat legal standards that applied to his investigation under the *Ombudsman Act 1976* (Cth).

[26] Part XI of this email demonstrates the logical incoherence of Mark Anstey's statements on the reviewability of Kate McMullan's public interest disclosure investigation.

[27] Part XII of this email addresses the sheer inappropriateness of Mark Anstey keeping me waiting 412 days from the date my complaint was made to notify me that, *as a matter of law and independent of the facts of my complaint*, since "the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID", which, as I demonstrate in part IV of this email, as a legal proposition, complete nonsense.

[28] Part XIII of this email sets out grounds of review that are specific to unlawful actions taken by officials in the Federal Court in respect of decisions to engage or "promote" ten registrars of the Federal Court of Australia. Part XIII has, for the most part, been prepared to dispel Mark Anstey's conclusions that most of the key finding that Kate McMullan made were not unreasonable for her to make, thus justifying the decision in Mr Anstey's mind to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[29] Much of Part XIII focuses on the evidence that Mark Anstey overlooked during the 412 days that officials in the Office of the Commonwealth Ombudsman faffed about before Mark Anstey decided to terminate the investigation commenced under section 8 of the *Ombudsman Act 1976* (Cth) by Penny McKay, the acting Commonwealth Ombudsman.

IV – GENERAL GROUND OF REVIEW – "REOPENING" A FINALISED PUBLIC INTEREST DISCLOSURE INVESTIGATION

[30] In his record of decision, Mark Anstey stated that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened." [4]

[31] To the extent that Mr Anstey is claiming that disclosable conduct set out in a public interest disclosure cannot be reinvestigated, that is demonstrably false.

[32] First, there is nothing in the nature of an administrative decision, such as a decision made under the *Public Interest Disclosure Act 2013* (Cth), which requires a conclusion that a power to make a decision, when purportedly exercised, is necessarily spent: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [5].

[33] As Gleeson CJ noted, the real issue is "whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen": *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [8].

[34] Second, the meaning of the word "investigate" "in relation to a disclosure, means investigate (or reinvestigate) whether there are one or more instances of disclosable conduct": *Public Interest Disclosure Act 2013* (Cth), s 47(2).

[35] Where a person conducting an investigation under the Ombudsman Act 1976 (Cth) finds that a public interest disclosure investigation (or aspect of a public interest disclosure investigation) are inadequate (which, for the reasons set out in the external disclosure report, they were), or that, in some respects, Kate McMullan did not exercise her lawful duty to investigate (which, for the reasons set out in the external disclosure report, happens to be the case), then the duty to investigate a public interest disclosure according to law, which extends to reinvestigation, would be enlivened.

[36] Parliament has explicitly provided powers (to adopt Mr Anstey's choice of terminology) to "reopen" a finalised public interest disclosure investigation because Parliament has, in the relevant Part and Division of the Public Interest Disclosure Act 2013 (Cth), explicitly defined the word "investigate" as meaning "reinvestigate" "one or more instances of disclosable conduct".

[37] Third, there is nothing in the *Public Interest Disclosure Act 2013* (Cth) that prohibits the re-investigation of a public interest disclosure because the original investigation was inadequate in law. On the contrary, the *Public Interest Disclosure Act 2013* (Cth) makes quite clear that one of its fundamental objects is to ensure that disclosures made by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d). It would be contrary to this object to infer that the re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is prohibited, particularly when the original investigation conducted by Kate McMullan is affected by legal errors, including errors that go to jurisdiction. Indeed, the inference to be drawn, in the light of the cannons of statutory interpretation, is that re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is not only permitted, but encouraged because a fundamental object of the *Public Interest Disclosure Act 2013* (Cth) is to ensure that disclosures made by public officials are to be properly investigated and dealt with. To permit a disclosure to remain improperly investigated and improperly dealt with would be to actively defeat a fundamental object of the *Public Interest Disclosure Act 2013* (Cth).

[38] Fourth, the claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure]" is demonstrably false because it is well within the Ombudsman's power to, along with any report issued under section 15 of the *Ombudsman Act 1976* (Cth) to the Australian Public Service Commission, include "any recommendations he or she thinks fit", which would extend to a recommendation to the Australian Public Service Commissioner to ensure that the public interest disclosure is properly investigated and dealt with. Practically speaking, were Mark Anstey to, under section 15 of the *Ombudsman Act 1976*, provide a report to the Australian Public Service Commissioner setting out the patent inadequacies of Kate McMullan's PID investigation, and provide recommendations for reinvestigation of the disclosable conduct identified in my public interest disclosure disclosure, then the Australian Public Service Commissioner would be, by the force of section 15 of the *Ombudsman Act 1976*, given cause to conduct a proper and, by extension, lawful investigation (an investigation that is not inadequate).

[39] I hasten to add that just because officials in the Office of the Commonwealth Ombudsman may not be able to *compel* the Australian Public Service Commissioner or his staff to re-investigate a public interest disclosure is not to say that the Commonwealth Ombudsman (or his officials) "cannot take any action that would cause an agency to re-investigate a PID." The power to compel a particular course of action does not exhaust the Commonwealth Ombudsman's ability to take action that would cause an agency to re-investigate a public interest disclosure. Were this the case, then the entire concept of lodging complaints with the Office of the Commonwealth Ombudsman in respect of an agency's failure to conduct a lawful public interest disclosure investigation would be feckless.

[40] In conclusion, that Mr Anstey has decided to terminate his investigation because he believes the Commonwealth Ombudsman (or his officials) "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" demonstrates how misconceived and incorrect Mark's decision to terminate his investigation is because, plainly:

a) the definition of investigating disclosable conduct set out in a public interest disclosure extends to the reinvestigation of disclosable conduct set out in a public interest disclosure; and

b) the Commonwealth Ombudsman (or his officials) can take action that would cause an agency to reinvestigate a public interest disclosure.

[41] Indeed, where the Commonwealth Ombudsman or his officials find that an investigation is inadequate, the Commonwealth Ombudsman and his officials must take such action that would give effect to the Parliamentary mandate that disclosures made by public officials are to properly investigated and dealt with.

[42] Mark Anstey is claiming that once a public interest disclosure investigation is finalised, regardless of whether the decision or the processes adopted are lawful, the disclosable conduct set out in the internal disclosure cannot, as a matter of law, be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."

[43] The implication of Mr Anstey's claim that a public interest disclosure cannot be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is that, in the last decade, during which the *Public Interest Disclosure Act 2013* (Cth) has not been substantively amended, there has never been "a mechanism for a finalised PID investigation to be reopened." Is the Australian community to understand that in the last decade, right or wrong, deficient, inadequate or otherwise, once a public interest disclosure investigation was finalised, there was simply no "mechanism for a finalised PID investigation to be reopened", such that a deficient or inadequate investigation was final and binding?

[44] What is the point of having a right to complain to the Office of the Commonwealth Ombudsman about the inadequacy of a public interest disclosure investigation if the legal position is, as Mark Anstey erroneously claims it to be, that a public interest disclosure cannot be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened"? In the light of the *Public Interest Disclosure Act 2013* (Cth) and the judgments of the High Court of Australia, the idiocy and unjustifiability manifested in the conclusion, which Mark Anstey took 412 days to come up with, are patent.

V – GENERAL GROUND OF REVIEW – NO "PRACTICAL OUTCOME" IN INVESTIGATING INADEQUATE PUBLIC INTEREST DISCLOSURE

[45] In his record of decision, Mark Anstey stated that it was his view that no practical outcome could be obtained by further investigation of the complaint into the inadequacy of Kate McMullan's public interest disclosure investigation. [5] That is nonsense.

[46] The practical outcome of the further investigation of the complaint under the *Ombudsman Act 1976* (Cth) would be to ensure that public officials at the Australian Public Service Commission are made aware of the patent inadequacies of Ms McMullan's PID investigation, and that, as a result of their recognition of Ms McMullan's failures, officials in the Australian Public Service Commission make sure, following Mr Anstey's recommendation (under section 15 of the *Ombudsman Act 1976*) to investigate the public interest disclosure because Kate McMullan's investigation was inadequate, that the internal disclosure is properly investigated and dealt with according to law because Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d).

[47] I also note that talk of practicality is misplaced. Practicality is a subordinate consideration. Legality is what Mark should have directed his mind to. Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with. In terminating the investigation he was conducting under section 8 of the *Ombudsman Act 1976* (Cth), all Mark Anstey has ensured is that the internal disclosure that was allocated to the Australian Public Service Commission, on 11 May 2020, by Elizabeth Bennet of the Office of the Commonwealth Ombudsman will not be properly investigated and dealt with. In other words, in deciding to abort his investigation under section 8 of the *Ombudsman Act 1976* (Cth) because continuing with the investigation is "not warranted having regard to all the circumstances", Mr Anstey has undermined an express object of the *Public Interest Disclosure Act 2013* (Cth) – the Parliamentary mandate that disclosures by public officials are to be properly investigated and dealt with.

VI – GENERAL GROUND OF REVIEW – FAILURE TO DISCLOSE MATERIAL INFORMATION USED TO MAKE ADVERSE DECISION

Disclosure of information as a fundamental manifestation of procedural fairness

[48] In ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, a unanimous High Court stated: [6]

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COMMONWEALTH OMBUDSMAN

Ombudsman ref: 2021-104592

12 December 2022

By email: [redacted]

Dear Discloser

I refer to your complaint of 26 October 2021 about the handling of a public interest disclosure (PID) by the agency who investigated the PID (the Investigating Agency).

I apologise for the time it has taken to complete our investigation of this matter. This was unavoidable due to the volume of material, the relative complexity of the matter, and the need to change case officers during our investigation. Thank you for your patience.

After considering the information provided by you and the Investigating Agency I have decided to finalise our investigation at this point.

Our Office has broad discretion to decline to further investigate when we consider it is not warranted having regard to all the circumstances. There are various considerations relevant to the exercise of this discretion. One key factor is whether further investigation is likely to result in a practical or otherwise substantive outcome. In this case it is my view there is no practical outcome we could obtain by further investigating the complaint.

When finalising investigations we conduct under the *Ombudsman Act 1976* we may provide comments and suggestions to agencies. We use this power to fulfil our broader role to seek to influence systemic improvement in government administration, including best practice administration of the Public Interest Disclosure (PID) scheme. When finalising this investigation with the Investigating Agency we intend to provide feedback about how it could improve its handling of PIDs in future.

I appreciate that you are likely to be disappointed by the outcome of your complaint given your view there were numerous deficiencies with the investigation of the PID and the resulting report under s 51 of the *Public Interest Disclosure Act 2013* (PID Act). It is important to note that our Office cannot take any action that would cause an agency to reinvestigate a PID. This is because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.

Our investigation is also not a reinvestigation of your disclosure. Rather, our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).

The PID investigation you complained about concerned recruitment processes and decisions made by a Commonwealth agency. Based on our investigation, which involved seeking copies of internal records from the Investigating Agency and interviewing the PID Investigator, I consider there are several ways in which the PID investigation and associated report could have been improved. That

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said, as noted below, I found that most of the key findings were not unreasonable for the Investigating Agency to make.

In completing this investigation I considered all the material you provided and the views raised in your correspondence with our Office. My assessment of what I consider to be the key issues raised by your complaint can be found under the headings below.

Record keeping

In my view, the PID Investigator did not create adequate investigation records for this matter or, alternatively, the Investigating Agency did not maintain relevant records. While the PID Act does not require investigators to make separate investigation records when conducting investigations under the PID Act our Office considers it best practice to do so. This is reflected in our Agency Guide to the PID Act (see paragraphs: 7.3.3.2, 7.3.3.5, and 7.5.2). We will be providing feedback to the Investigating Agency on this point.

Broadbanding and EL2 appointments

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that *"it is acceptable for broadbanding arrangements to extend to SES classification"*. As you noted, there is no broadbanding between EL classifications and SES.

As you would be aware, broadbanding allows an employee to progress in classification without needing to apply for an advertised role at the higher level. The Australian Public Service Commission's (APSC) current APS Classification Guide states, '*Broad-banding removes the need for open, competitive selection processes between each of the APS classification levels within the broadband'* (at 34). While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a *"proposition that the … role could bear a classification of both Executive Level 2 and SES Band 1".* In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role.

The APSC's Australian Public Service Classification Guide explains *'The essential function of the classification framework is to group together jobs with similar features of work value, based on the level of complexity and depth of responsibility expected. It also assists with managing the workforce in that employees can be matched to clearly identified jobs.'* This means that, depending on the level of complexity and depth of responsibility expected, similarly titled roles can have different classifications.

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that *'the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)'* due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

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Related to the PID Investigator's alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person's IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

Role Review

Further to the above I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made *"on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)"*. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

NSW Appointment

Due to insufficient investigation records having been retained by the Investigating agency we cannot confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW

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for the SES1 appointment that was subsequently made in NSW. We will provide feedback to the Investigating Agency on this point.

Alleged targeting of particular applicants

In my view, it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level. I agree with the PID Investigator's conclusion that the primary lesson to learn from this part of the recruitment process was that the agency should have more clearly communicated with staff about the role review process and what led to the decision to classify certain roles at either EL2 or SES level.

Finding the agency engaged in disclosable conduct

You raised concern a finding was made that the agency breached the Code of Conduct and individual findings were not made. You asserted the finding the agency engaged in disclosable conduct arguably carried with it an implication that certain officers may have engaged in disclosable conduct. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue. We will be providing feedback to the agency on these points.

Allegation that another appointee was unmeritorious / lacked essential criteria

You alleged one candidate's appointment was unmeritorious because the appointee did not possess one of the criteria listed as an essential requirement for the position. You maintained this position notwithstanding the fact the individual obtained this essential requirement within a short period of being appointed.

As part of this investigation we sought advice from the APSC in its capacity as the agency with policy responsibility in this area. The APSC, in this capacity, advised that an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period.

While I appreciate that you may have a different view on this, the PID Investigator's finding that disclosable conduct did not occur aligns with the view of the agency with policy responsibility in this area.

I note your view the alleged favouritism shown to that appointee was first present during the shortlisting process. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID. We will provide feedback to the Investigating Agency on these points.

PID report

I acknowledge your dissatisfaction with the s 51 report. I agree it lacked one key feature our Office expects a s 51 report to contain. Specifically, while it noted the conclusions drawn were based *"on the materials before me"*, in our view, principles of good administration and the PID Standard require the summary of evidence in the report include a discussion of the content of the evidence obtained,

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the investigator's assessment of that evidence (for example, whether it is credible, consistent and compelling) and how the evidence shaped the investigator's conclusions. We will provide feedback to the Investigating Agency on this point.

Final comments

In my view, while the internal record keeping could have been more robust and the PID report could have contained further detail about the investigation undertaken and the evidence considered, I cannot conclude that the findings of the PID Investigator were clearly unreasonable.

In these circumstances, I have decided that further investigation is not warranted, and the investigation of your complaint is now finalised. I appreciate that you may be disappointed with the decision to finalise the investigation of your complaint. Nevertheless, I do not believe there is any practical outcome we could obtain by further investigating the complaint.

As I have explained, we intend to provide feedback to the agency about the issues identified in our investigation.

Thank you for bringing your concerns to the attention of the Commonwealth Ombudsman's Office.

Yours faithfully

Mark
A/g Assistant Director

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